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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 734

NATHAN R. ALLTMONT AND CHARLES O'NEILL, PETITIONERS

v.

UNITED STATES OF AMERICA, UNITED STATES MARITIME COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court for the Eastern District of Pennsylvania (R. 177) is reported at 79 F. Supp. 827. The *per curiam* opinion of the Court of Appeals for the Third Circuit, remanding the cause for clarification of the decree (R. 191) is not reported. The supplemental memorandum *sur decree* of the District Court (R. 194) is reported at 87 F. Supp. 214. The opinion of the Court of Appeals *in banc* (R. 208) is reported at 177 F. 2d 971. The order of the Court of Appeals amending its opinion is not reported (R. 223).

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JURISDICTION

The judgment of the Court of Appeals was entered on November 23, 1949 (R. 224). By orders of Mr. Justice Burton dated January 31, 1950 (R. 225), and March 15, 1950 (R. 226), the time for filing a petition for a writ of certiorari was extended to, and including, April 5, 1950. The petition for a writ of certiorari was filed on April 5, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTIONS PRESENTED

1. Whether copies of statements of witnesses taken after suit is commenced and in preparation for trial may be obtained by interrogatories under Admiralty Rule 31 or only by discovery under Admiralty Rule 32 upon a showing of good cause.

2. Whether copies of statements of witnesses taken at the direction of Government counsel by agents of the Federal Bureau of Investigation after suit is commenced are the work product of counsel within the doctrine of *Hickman* v. *Taylor*, 329 U. S. 495.

RULES OF PROCEDURE INVOLVED

Admiralty Rules 31 and 32 are set forth in the Appendix, *infra*, pp. 17–18.

STATEMENT

On November 19, 1945, the Government owned and operated tanker *Cedar Mills* was destroyed

by the explosion of a mine at Ancona, Italy, then a British-occupied port (R. 152, 167–170, 177). These proceedings brought by petitioners, members of the crew of the *Cedar Mills*, seek to recover damages and maintenance and cure for personal injuries allegedly sustained by them.

After the institution of suit, petitioners, proceeding under Admiralty Rule 31,[1] filed interrogatories (R. 12–13, 23–25) to which the United States filed exceptions. These exceptions were overruled, and thereafter the Government filed its answers to the questions propounded. These answers were, in the words of the District Judge, complete and a "* * * bona fide effort to make full disclosure * * *" with one exception (R. 177–178). The Government declined to comply with a portion of the interrogatories which would have required the production of copies of written statements of persons having knowledge of the accident, taken by the Federal Bureau of Investigation.[2] Two grounds were urged in sup-

[1] Admiralty Rules 31 and 32, prior to March 19, 1948, were identical with Rules 33 and 34 of the Federal Rules of Civil Procedure.

[2] Interrogatory No. 2 in the *O'Neill* case, which is identical with Interrogatory No. 3 in the *Alltmont* case, states (R. 12, 23):

"2. Attach hereto true and correct copies of all written statements (signed or unsigned) from any and all persons including the plaintiff who purport to be witnesses or have any knowledge regarding the said accident and/or injuries or any matter connected therewith or related thereto, includ-

port of this refusal to produce: (1) that such statements were the work product of the Department of Justice; and (2) that the statements were privileged under Department of Justice Order No. 3229 of May 2, 1939 (R. 177–178).

The information furnished or made available to petitioners comprised the following: (1) Report dated November 26, 1945, of an investigation begun on November 20, 1945, by War Shipping Administration representative Daily (R. 73–75); (2) Report dated November 26, 1945, of an investigation begun on November 22, 1945, by War Shiping Administration representative Wanat (R. 82–87); (3) Statements of the Master, Chief Mate, Third Officer, 1st Asst. Engineer, and Purser of the *Cedar Mills* given under oath at Leghorn, Italy, on November 26, 1945, during an investigation by the United States Coast Guard (R. 30–73); (4) Findings of the Coast Guard Examining Officer (R. 162); (5) Statement of the Master of the *Cedar Mills* to his home office dated January 29, 1946 (R. 80–82); (6) Statement of petitioner Alltmont, Chief Engineer of the *Cedar Mills,* dated April 2, 1946 (R. 76–80); (7) Copy of entries in the rough bridge log book (R. 19–20); (8) Copy of entries in the bridge bell

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ing statements taken by the Federal Bureau of Investigation. Attach hereto true copies of memoranda of any oral statements which the American Petroleum Transport Corporation or its representatives or the United States of America have obtained or received from any such person."

book (R. 21–22); (9) Official log book of the *Cedar Mills* (R. 162); (10) Routing instructions for leaving and entering Ancona (R. 172–174); (11) Admiralty Chart No. 3212 issued by the United States Hydrographic Office (R. 161); (12) Extracts of Monthly Minesweeping Reports issued by the British Navy (R. 175–176); (13) Payroll records of the *Cedar Mills* (R. 30); (14) Names and addresses of potential witnesses (R. 26–27, 170–171).

As indicated above, the Government made a full disclosure of the facts in its possession, withholding only copies of statements taken by agents of the Federal Bureau of Investigation at the direction of Government trial counsel. These statements, which are summarized at R. 170–171, were obtained after the commencement of the instant litigation in the preparation of the Government's defense. However, the Government did furnish petitioners the names and addresses of those persons making the statements in question (R. 26–27, 170–171, 222).

Petitioners then moved for judgment for failure to produce copies of these statements (R. 88–89). At the hearing (R. 98–151), a formal claim of privilege personally signed by the Attorney General was filed (R. 90–94). During the course of oral argument, petitioners, for the first time, moved for discovery pursuant to Admiralty Rule 32 (R. 95–97, 99–100, 102). An affidavit attempting to meet the good cause requirement of

Admiralty Rule 32, and the Government's counter affidavit, were filed after the hearing (R. 152–159, 160–176).

In opposition to petitioners' motion for judgment, the Government made three contentions: (1) Copies of statements of witnesses taken after suit is commenced may be obtained only by discovery under Admiralty Rule 32 upon a showing of good cause and not by interrogatories under Admiralty Rule 31; (2) Such copies of statements of witnesses are the work product of counsel within the scope of the protection accorded by *Hickman* v. *Taylor*, 329 U. S. 495; and (3) Statements contained in F. B. I. reports are privileged as confidential records of the Government.

The District Court ruled against the Government on all three grounds (R. 177–182). Since it held that the Government was required by Admiralty Rule 31 to produce copies of the statements in question, the District Court found it unnecessary to act upon petitioners' motion to produce those statements under Admiralty Rule 32. The court concluded, however, that it would be inappropriate to enter judgment by default against the United States. Instead it entered an interlocutory order precluding the United States from opposing petitioners' claims that their injuries were due to negligence on the part of the personnel of the vessel or the unseaworthiness of the vessel or both, reserving for further hearing

and determination the actual amount of damages to be awarded (R. 183–184).

On appeal, the Court of Appeals observed that the recitals in the decree conflicted with certain facts disclosed by the record (R. 192–193) and therefore vacated the decree and remanded the causes (R. 191–193). Upon remand, the District Court reformed its interlocutory decree and reentered it (R. 194–197). The interlocutory decree as amended and reentered was then reversed by the Court of Appeals, sitting *in banc* (R. 224).

The court below stated that the sole question "necessary to decide" was whether the District Court correctly held that petitioner could obtain the requested statements under Admiralty Rule 31 without a prior showing of good cause (R. 208). Examining the integrated scheme of the discovery rules, the Court of Appeals concluded that "a construction of the two Rules which would permit a party to obtain a copy of a document as of right under Admiralty Rule 31 or Civil Procedure Rule 33 but would compel him to show good cause under Admiralty Rule 32 or Civil Procedure Rule 34 to see the original would border on the capricious" (R. 219–220). The court also considered the opinion of this Court in *Hickman* v. *Taylor,* 329 U. S. 495, and held that it saw "no logical basis for making any distinction between statements of witnesses secured by a party's trial counsel personally in preparation for trial and

those obtained by others for the use of the party's trial counsel" (R. 217), that "in either situation, the rationale of the opinion of the Supreme Court in the Hickman case requires that the same showing of good cause for the production of such statements of witnesses should be made by the adverse party seeking copies of them. This necessarily means that their production is to be had under Civil Procedure Rule 34 (or Admiralty Rule 32) upon a showing of good cause rather than as a matter of right under Civil Procedure Rule 33 (or Admiralty Rule 31)" (R. 218).

Accordingly, the court below remanded the causes to permit the District Court to exercise its judgment as to whether petitioners have shown good cause under Admiralty Rule 32, and left open for later consideration the Government's claim of privilege (R. 221–222).

ARGUMENT

Following the reversal of his judgment by this Court in *Hickman* v. *Taylor* (329 U. S. 495), affirming the judgment of the Third Circuit Court of Appeals *in banc* (153 F. 2d 212), Chief Judge Kirkpatrick, the District Judge in this case, reiterated the so-called "Philadelphia rule" which sanctions the practice of obtaining copies of statements of witnesses in answer to interrogatories without a showing of good cause. *DeBruce* v. *Pennsylvania R. Co.*, 6 F. R. D. 403 (E. D. Pa.). The justification for continuation

of the rule was said to be found in a dictum of the court below in its *Hickman* opinion and in the fact that this Court, in the *Hickman* case, did not specifically disapprove or forbid the procedure. *Id.* at 405. In the instant case, the "Philadelphia rule" was specifically applied to limit the work product rationale of the *Hickman* case to statements taken by counsel personally.

In reversing the district court judgment on this point of practice, the court below found that the language and purpose of the relevant rules of procedure require a party to show good cause under Admiralty Rule 32 or Civil Procedure Rule 34 to compel the production of copies of statements of witnesses (R. 218–220).[3] The conclusion reached was fortified by a classification of the statements sought herein by petitioner as within the work product category of this Court's opinion in *Hickman* v. *Taylor*. Thus corrected, the procedure to be followed by the district courts under the supervision of the court below, with regard to the production of statements of witnesses, is brought into line with the substantially uniform practice followed throughout the Federal courts. We submit that the decision below is correct, the proper practice established, and that there is no occasion for review by this Court.

[3] In the course of its opinion, the court below has specifically withdrawn any support for the "Philadelphia rule" furnished by way of its dictum in the *Hickman* case (R. 218).

1. With virtual unanimity, the many District Courts which have considered the question here presented have taken the view that the production of statements of witnesses may be compelled only upon a showing of good cause therefor under Admiralty Rule 32 or its counterpart, Rule 34 of the Federal Rules of Civil Procedure.[4] *Curtis* v. *United States,* 27 F. Supp. 459, 460 (D. Mass.); *Creden* v. *Central R. Co. of New Jersey,* 1 F. R. D. 168 (E. D. N. Y.); *Gaumond* v. *Spector Motor Service,* 1 F. R. D. 364, 365 (D. Mass.); *The Poling Bros. No. 6,* 2 F. R. D. 336, 337 (E. D. N. Y.); *Roth* v. *Paramount Film Distributing Corporation,* 4 F. R. D. 302, 305 (W. D. Pa.); *American Tobacco Co. et al.* v. *S. S. Gouland-ris,* 1946 A. M. C. 1032 (S. D. N. Y.); *Walling* v. *Parry,* 6 F. R. D. 554, 556 (W. D. Pa.); *Hoffman*

[4] *Dugger* v. *Baltimore & O. R. Co.*, 5 F. R. D. 334 (E. D. N. Y.), and *Hayman* v. *Pullman Co.*, 8 F. R. D. 238 (N. D. Ohio) appear to be in accord with the court below. But see the following decisions of the same courts contra: *Creden* v. *Central R. Co. of New Jersey*, 1 F. R. D. 168 (E. D. N. Y.); *The Poling Bros. No. 6*, 2 F. R. D. 336, 337 (E. D. N. Y.); *Hoffman* v. *Chesapeake & O. Ry. Co.*, 7 F. R. D. 574 (N. D. Ohio); *Dellameo* v. *Great Lakes S. S. Co.*, 9 F. R. D. 30 (N. D. Ohio).

In a few cases, production of such statements has been required in connection with interrogatories filed under Admiralty Rule 31 or Civil Procedure Rule 33 but, in nearly all of those cases, it appears that the court directed their production only after satisfying itself that good cause was, in fact, shown. *Kennedy* v. *Mississippi Valley Barge Line Co.*, 7 F. R. D. 78 (W. D. Pa.); *Newell* v. *Capital Transit Co.*, 7 F. R. D. 732, 734 (D. D. C.); *Alfred Pearson & Co. (Pty.) Ltd.* v. *Hayes et al.*, 9 F. R. D. 210 (S. D. N. Y.).

v. *Chesapeake & O. Ry. Co.*, 7 F. R. D. 574 (N. D. Ohio); *Jones* v. *Pennsylvania R. Co.*, 7 F. R. D. 662, 663 (N. D. Ill.); *Bruen* v. *Huff*, 8 F. R. D. 322 (W. D. Pa.); *Dellameo* v. *Great Lakes S. S. Co.*, 9 F. R. D. 30 (N. D. Ohio); *Castro* v. *A. H. Bull & Co.*, 9 F. R. D. 84 (S. D. N. Y.); *Walsh* v. *Pullman Co.*, 9 F. R. D. 107 (D. Mass.); *Borgen* v. *Pennsylvania Greyhound Lines*, 9 F. R. D. 209, 210 (N. D. Ohio). See also Alexander Holtzoff, *Instruments of Discovery under Federal Rules of Civil Procedure*, 41 Mich. L. Rev. 205, 214, 218; Caskey and Young, *Some Limitations Upon Rule 33 of the Federal Rules of Civil Procedure*, 28 Va. L. Rev. 348, 356, 358; 2 Moore's *Federal Practice*, § 34.04, p. 2639.

Petitioners' contrary position, in urging the adoption of the unique "Philadelphia rule," is that "In the search for 'discovery facts,' a party may inquire by interrogatory of the adversary for the precise information furnished by any witness. * * * It follows from this that a request for a copy of a statement must likewise be disclosed in answer to an interrogatory under [Civil Procedure] Rule 33 because a copy of a document actually involves the disclosure of the substance of the statement and not the production of the document itself" (Pet. 26).

But as the court below points out (R. 219–221), petitioners' premise is in error. Under Civil Procedure Rule 33 and Admiralty Rule 31, a party has an absolute right to full disclosure of

all the relevant unprivileged facts in his adversary's possession, including information as to relevant statements and other documents in his control and the names and addresses of all persons having knowledge of relevant facts whom he or his agents have interviewed. The rules do not, however, confer an absolute right to identification of a particular witness as the source of specific facts. Having been informed by use of interrogatories as to the existence, nature and location of statements of witnesses, a party may then move for their production under Civil Procedure Rule 34 or Admiralty Rule 32 upon a showing of good cause.

Petitioners' assertion that this procedure serves only to emphasize needless technicalities (Pet. 32) ignores the basic distinction between Admiralty Rules 31 and 32.[5] Production of a document under Admiralty Rule 32, as contrasted with disclosure of information under Admiralty Rule 31, can be obtained only after good cause has been shown. To compel production of a copy of a document in answer to an interrogatory would virtually vitiate Admiralty Rule 32. For if a party can obtain a copy of a desired document as of right under Admiralty Rule 31, it is hardly likely that he would assume the burden under

[5] Petitioners' suggestion, that the "Philadelphia rule" is necessary to prevent "* * * dishonest and incomplete answers * * *" to interrogatories (Pet. 9, 25, 33–34) is disposed of in *Hickman* v. *Taylor*, 329 U. S. at 509.

Admiralty Rule 32 of having to show good cause for its production only to assume the additional burden of making a copy of it at his own expense.[6] As the court below pungently comments (R. 219–220), petitioners' construction of the rules "border[s] on the capricious * * * it would require a showing of good cause only in case a party desired visually to examine the document as to its form but not when he sought information as to its contents. In common experience, however, the contents of most documents are of much more importance to the parties than their physical form."[7] And Admiralty Rule 32 itself recognizes its utility as a means of obtaining copies; it is not limited to production for inspection as

[6] As noted below (R. 219, fn. 9), "The task of preparing copies of papers and documents called for under the discovery procedure may at times be a very burdensome one. See, for example, *Niagara Duplicator Co.* v. *Shackleford*, C. A. D. C. 1947, 160 F. 2d 25; *Cinema Amusements* v. *Loew's Inc.*, D. C. Del. 1947, 7 F. R. D. 318, 321."

[7] As to petitioners' repeated suggestion that the logical conclusion of the decision below precludes from disclosure any information contained in a writing because it would be tantamount to production of the writing (Pet. 9, 10, 11, 17, 32), little comment is needed. That an adversary is not required, absent a showing of good cause, to disclose what a particular witness has stated does not, of course, mean that he is not obliged to disclose all the relevant facts and the names of the persons from whom the facts were obtained. Whatever the proper procedure may be where all the facts are ascertained from a single witness whose identity has been disclosed, in a case such as the one at bar the result pointed to by petitioners is imaginary.

petitioners appear to suggest (Pet. 17). See Appendix, *infra*, p. 18.

2. Alternative support for the result reached by the court below is supplied by the work product rationale of *Hickman* v. *Taylor*, *supra*, under which the statements here in question, taken by agents of the Federal Bureau of Investigation at the direction of Government counsel after suit was commenced, are protected from discovery in the absence of a showing of good cause.

As we understand the *Hickman* decision, no valid distinction can be drawn between statements obtained by counsel himself and those taken by his agents,[8] who may or may not be lawyers, under his direction, after suit has been filed and in preparation for trial. Statements of witnesses are not customarily stenographic transcriptions. Whether taken by counsel, or by his assistants, they are generally summaries in the interviewer's own language of his impression of what the witness has said. In each case, the questions directed at the witness are permeated with counsel's legal theories and analysis of what is material and relevant, and the statements ultimately become part of counsel's work file. In each case, the practical effect of permitting their discovery without good cause is to reduce a trial to a battle of statements where witnesses are not cross-examined as to the facts brought out on

[8] We are not here concerned with "train crew reports" and the like. Cf. Pet. 28. Reports of this nature were made available to petitioners. See *supra*, pp. 4–5.

direct examination but as to what was said in prior statements. Cf. Jackson, J., concurring in *Hickman* v. *Taylor*, supra, at 516–517.

3. We respectfully suggest that, in any event, this case is not yet ripe for certiorari. Petitioners seek review herein of an interlocutory order which remands to the district court the question whether petitioners have, in fact, shown good cause under Admiralty Rule 32 for the production of copies of witnesses' statements taken after suit was commenced. In the event that the district court holds that petitioners have failed to establish good cause, such ruling may become academic if petitioners prevail on the merits. Should final judgment be awarded against petitioners, the denial of the writ at this stage would not limit appellate review of the whole case to determine whether reversible error was committed at any stage. *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U. S. 399, 418; *Hamilton Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U. S. 251, 258; *Panama R. R. Co.* v. *Napier Shipping Co.*, 166 U. S. 280, 284. On the other hand, should the district court hold that petitioners have established good cause, the court below would then reach the question here left open, *i. e.*, whether such statements are privileged by statute and regulation as confidential records of the Government. Review of the case at this time would deprive the Court of a complete record as the basis for consideration and decision of all preliminary questions.

These considerations strongly support the application to this case of the policy of this Court which limits certiorari review to final decrees. Concededly, the writ may issue to review interlocutory decrees in extraordinary circumstances. Cf. *Forsyth* v. *Hammond,* 166 U. S. 506, 514–515; *Hanover Star Milling Co.* v. *Metcalf,* 240 U. S. 403, 408; *Landis* v. *North American Co.,* 299 U. S. 248, 254. No such circumstances are presented by this case. On the contrary, the occasion for the application of the traditional policy is particularly clear here where the result reached by the court below is in accord with substantially all decided cases on the same question.[9] *Supra,* pp. 10–11.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1950.

[9] Compare *Hickman* v. *Taylor* where, although review was sought of a final order adjudging defendants in contempt, certiorari was initially denied (327 U. S. 808) and then granted on petition for rehearing (328 U. S. 876) because of "the importance of the problem, which has engendered a great divergence of views among district courts * * *." 329 U. S. 495, 500.

APPENDIX

Admiralty Rule 31. Interrogatories to Parties

Any party may serve upon any adverse party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association, by any officer thereof competent to testify in its behalf. The interrogatories shall be answered separately and fully in writing under oath. The answers shall be signed by the person making them; and the party upon whom the interrogatories have been served shall serve a copy of the answers on the party submitting the interrogatories within 15 days after the delivery of the interrogatories, unless the court, on motion and notice and for good cause shown, enlarges or shortens the time. Objections to any interrogatories may be presented to the court within 10 days after service thereof, with notice as in case of a motion; and answers shall be deferred until the objections are determined, which shall be at as early a time as is practicable. No party may, without leave of court, serve more than one set of interrogatories to be answered by the same party.

Admiralty Rule 32. Discovery and Production of Documents and Things for Inspection, Copying, or Photographing

Upon motion of any party showing good cause therefor and upon notice to all other parties, the court in which an action is pending may (1)

order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence material to any matter involved in the action and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated relevant object or operation thereon. The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just.

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